

STEVEN ROBERTSON)	
)	
Claimant-Respondent)	DATE ISSUED:
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Mark W. Davis (Davis & Emil), Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (94-LHC-0997) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel sought an attorney's fee of \$4,522.50, representing 33.50 hours at \$135 per hour, plus \$1,209.55 in expenses, for work performed before the administrative law judge in connection with claimant's claim for disability compensation and medical benefits arising from an April 12, 1992, work-related back injury. The administrative law judge awarded counsel a fee of \$3,812.50, representing 30.50 hours at an hourly rate of \$125, plus expenses of \$1,209.55. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award. Employer replies to claimant's response brief.

Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *George Hyman Construction Co. v.*

Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), employer initially asserts that the entire fee petition is excessive considering claimant's limited success in the prosecution of his claim. We disagree. Initially, we note that the administrative law judge considered this objection, as well as the regulatory criteria of 20 C.F.R. §702.132, in making the fee award, and that he thereafter reduced the number of hours sought by 3 hours. In this case, moreover, although employer voluntarily paid claimant temporary total disability compensation at the rate of \$287.54 per week from June 12, 1992 through November 15, 1993, totalling \$21,779.01, and temporary partial disability benefits thereafter through the time of the hearing at the rate of \$37.13 per week premised on a post-injury wage-earning capacity of \$375.61, at the hearing employer alleged that an automobile accident occurred on July 28, 1992, which was a subsequent intervening cause sufficient to relieve it of liability beyond that date. In addition, employer argued that it was not liable for the medical services and back surgery performed by Dr. Danielson because this treatment was unauthorized. As a result of counsel's efforts before the administrative law judge, claimant prevailed in establishing employer's continued liability for his disability benefits and interest on any accrued and unpaid compensation benefits. Moreover, counsel succeeded in establishing employer's liability for the disputed medical services performed by Dr. Danielson. In addition, while counsel did not prevail in his assertion that claimant was entitled to partial disability compensation based on the difference between the stipulated average weekly wage of \$431.31 and a post-injury wage-earning capacity of \$200 per week (\$5 x 40 hours), counsel did succeed in increasing claimant's continuing partial disability award to \$114.21 per week premised on a post-injury wage-earning capacity of \$260 per week. Inasmuch as this figure is almost three times the \$37.13 partial disability rate which employer had been paying voluntarily and given the high degree of success counsel otherwise achieved, employer has not met its burden of establishing that the \$3,812.59 fee awarded by the administrative law judge is inconsistent with *Brooks* and *Hensley*. See generally *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 93 (1993)(Brown, J., dissenting).

We also reject employer's objections to the number of hours and hourly rate awarded, as it has not shown that the administrative law judge abused his discretion in this regard. See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Although employer avers that any and all time incurred by counsel for involvement of claimant's own vocational expert should be disallowed as unnecessary to the prosecution of this claim, the administrative law judge acted within his discretion in allowing these services, which he rationally viewed as necessary to rebut the testimony of employer's vocational rehabilitation counselor. See generally *Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22 (1988).¹

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

¹Although employer objected below to October 21, 1993, and April 26, 1994, entries, the administrative law judge properly found that he was not required to address these entries, as they did not appear in the fee petition before him.

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge